Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
NATIONAL PARK SERVICE-MONTANA COMPACT

* *

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE NATIONAL PARK SERVICE WITHIN THE STATE OF MONTANA	)	**CASE NO. WC-94-1**

FINDINGS OF FACT AND CONCLUSIONS OF LAW APPROVING AND CONFIRMING THE UNITED STATES NATIONAL PARK SERVICE–MONTANA COMPACT

THIS MATTER came before the Court on a joint motion of the State of Montana and the United States of America for approval of the United States National Park Service-Montana Compact, § 85-20-401, MCA. Based on the submissions of the State and the United States, the Compact and the record in this case, the Court now issues the following:

Findings of Fact

Federal Reserved Water Right Claims

1. In 1979, the State of Montana commenced a comprehensive, general, state-wide adjudication of the rights to the use of water within the State of Montana, including all federal reserved and appropriative water rights, pursuant to Title 85, Chapter 2 of the Montana Code Annotated.

2. In 1979, the United States filed in the United States District Court for the District of Montana several actions to adjudicate, *inter alia,* its rights to water with respect to Glacier National Park. United States National Park Service–Montana Compact, § 85-20-401 (Recital), MCA (hereinafter referred to as the "Compact"). *See United States v. Aageson* (D. Mont. 1979), No. CV-79-21-GF; *United States v. Abell* (D. Mont. 1979), No. CV-79-33-M; *United States v. AMS Ranch, Inc.* (D. Mont. 1979), No. CV-79-22-GF. On December 9, 1983, the United States Court of Appeals for the Ninth Circuit ordered the United States District Court for the District of Montana to stay proceedings there until the Montana Water Court proceedings were concluded. *N. Cheyenne Tribe v. Adsit* (9th Cir. 1983), 721 F.2d 1187, 1189. *See also Arizona v. San Carlos Apache Tribe* (1983), 463 U.S. 545.

Reserved Water Rights Compact Commission Negotiation

3. In 1979, the Montana Legislature stated its intent that the State of Montana attempt to conclude compacts for the equitable division and apportionment of waters between the State and its people and the federal government claiming reserved waters within the State. At the same time, it established the Reserved Water Rights Compact Commission ("Commission") to act on behalf of the governor and the people of Montana as a whole in those negotiations. Sections 85-2-701 to -703 & 2-15-212, MCA.

4. In 1983, the Commission commenced general negotiations with the United States National Park Service ("NPS") (together referred to as the "Settling Parties") to quantify "for all time any and all claims to water" by the United States to that portion of the following five NPS units situated within the State of Montana: Big Hole National Battlefield, Glacier National Park, Little Bighorn Battlefield National Monument, Bighorn Canyon National Recreation Area, and Yellowstone National Park ("NPS units"). Letter from W. Gordon McOmber, Chairman, Reserved Water Rights Compact Commission, to Chief Judge W.W. Lessley, Montana Water Court, May 15, 1985 Update Regarding Status of Compact Negotiations with the Department of Interior, National Park Service (June 19, 1985).

5. Yellowstone National Park. Yellowstone National Park was first withdrawn and reserved by Act of Congress on March 1, 1872, for "a public park or pleasuring-ground for the benefit and enjoyment of the people," with directions for the Secretary of the Interior to make regulations to "provide for the preservation, from injury or spoilation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition." Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32. *See also* Compact art. I(41), § 85-20-401, MCA; Reserved Water Rights Compact Commission Staff, *Compact Settlement Between the Montana Reserved Water Rights Compact Commission and the Department of Interior, National Park Service 1993 and 1995* (April 1997) 25 (hereinafter referred to as "Technical Report").

Little Bighorn Battlefield National Monument. The Little Bighorn Battlefield National Monument was first created as a national cemetery by Presidential Proclamation of December 7, 1886, and by Act of March 22, 1946, 60 Stat. 59, pursuant to the Antiquities Preservation Act of 1906, 16 U.S.C. § 431, when the national cemetery was designated the Custer Battlefield National Monument for the historical interpretation of the monument. *See* Executive Order of December 7, 1886; Compact art. I(24), § 85-20-401, MCA; Technical Report, at 22-23.

Glacier National Park. Glacier National Park was withdrawn and reserved from previously reserved national forest lands by Act of Congress on May 11, 1910, "as a public park or pleasure ground for the benefit and enjoyment of the people of the United States," with directions for the Secretary of the Interior to make regulations to "provide for the preservation of the park in a state of nature so far as is consistent with the purposes of this Act, and for the care and protection of the fish and game within the boundaries thereof." Act of May 11, 1910, ch. 226, § 1, 36 Stat. 354; Act of February 27, 1915, 38 Stat. 814; Act of April 11, 1972, 86 Stat. 120. *See also* Compact art. I(16), § 85-20-401, MCA; Technical Report, at 17.

Big Hole National Battlefield. The Big Hole National Battlefield was first established by Executive Order No. 1216 on June 23, 1910, pursuant to the Antiquities Preservation Act of 1906, 16 U.S.C. § 431, for "military purposes for use in protecting said monument. . . ." Land was added to the unit by Presidential Proclamation No. 2339 on June 29, 1939, and by Congress in 1963, 77 Stat. 18, with the understanding that the additional lands were "necessary for the proper care, management, and protection of the historic landmarks included within the monument. . . ." Presidential Proclamation No. 2339, 53 Stat. 1963, June 29, 1939. *See also* Compact art. I(2), § 85-20-401, MCA; Technical Report, at 11.

Bighorn Canyon National Recreation Area. The Bighorn Canyon National Recreation Area was first established by Act of Congress on October 15, 1966, "for public outdoor recreation use and enjoyment of the proposed Yellowtail Reservoir and lands adjacent thereto. . . . and for preservation of the scenic, scientific, and historic features contributing to public enjoyment of such lands and waters. . . ." Act of October 15, 1966, 80 Stat. 913. *See also* Compact art. I(3), § 85-20-401, MCA; Technical Report, at 14.

6. Members of the Commission Negotiating Team were Chris Tweeten, Commission Chairman; Dave Wanzenried, Negotiating Team Chairman; Senator Lorents Grosfield; and former Representative Bob Thoft. Members of the NPS Negotiating Team were Charles W. Pettee (preceded by Owen Williams), Chief of the NPS Water Rights Branch, Fort Collins, Colorado; Richard Aldrich, field Solicitor for the Department of Interior in Montana; Eric Gould and Dave Gehlert, United States Department of Justice, Washington, D.C.; and Jim Dubois, United States Department of Justice, Denver, Colorado. Technical Report, at 4.

7. The negotiations between the Commission and the United States broke off in 1986 because of disagreement over the proposed amounts of instream flows, but resumed again in 1992. Technical Report, at 3-4; Tweeten Aff., at 2 (July 15, 2003). Charles W. Pettee, Chief of the NPS Water Rights Branch for this region, affirmed by affidavit that:

> The Compact is the result of good faith, arm's length negotiations. The negotiators held frequent meetings and formed legal and technical subgroups comprised of staff from both sides to gather data necessary to resolve issues or develop Compact terms. The meeting chair responsibility, including development and control of the agenda, was shared between the NPS and Commission on an alternating basis. Meeting notes were produced and shared between the parties to confirm agreements and unresolved issues.
>
> During the negotiations, the NPS and the Commission exchanged technical information and proposals for resolving issues. The NPS evaluated concerns and conducted technical analyses as warranted, including consulting with subject matter experts. Issues and recommendations for resolving them were discussed with park managers for approval by NPS policy makers. Technical data was collected and analyzed and interpreted by staff or subject matter experts with considerable experience. Compact terminology was reviewed by subject matter experts to ensure that it was reasonable and would be effective in meeting the intended objective of protecting water-related resource values. . . .
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> . . .
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> The Compact received extensive technical and policy review. Throughout the negotiations, technical support and advisory assistance was provided by hydrologists from the Water Rights Branch, including myself, resource managers and superintendents representing NPS units in Montana, and subject matter experts contracted to advise the NPS, including experts in the biological, geomorphological, riparian vegetation, and geothermal sciences.
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> The recommendations of the technical team were fully reviewed by officials of both the Departments of Justice and the Interior, which approved and executed the Compact.

Pettee Aff., at 2-3 (July 14, 2003).

8. Chris Tweeten, Commission Chairman, affirmed by affidavit that:

> The Compact negotiations were based on three years of work by legal and technical professionals with expertise in water resources and related fields. The Compact is a result of intensive good-faith negotiations between well-represented parties with dissimilar interests. There was extensive public involvement, including numerous public meetings, information sessions, and individual meetings with water users. Some of the ideas that were eventually incorporated into the terms of the Compact were originally proposed by [private] water users.

Tweeten Aff., at 3-4.

9. Susan Cottingham, Commission Program Manager, affirmed by affidavit that:

> To advise the Commission on legal and factual matters, a staff technical team [was] formed for each negotiation. The members of the technical team . . . were Barbara Cosens, Legal Counsel; Arial Anderson, Soil Scientist; Bill Greiman, Agricultural Engineer; Dave Amman, Hydrologist; Craig Bacino, geographer and GIS specialist; and Joan Specking, Historical Researcher. . . .
>
> The Commission staff technical team members are experienced professionals in their respective fields. A comprehensive legal and factual investigation was conducted prior to and continued throughout the negotiations with the . . . National Park Service. This investigation included extensive research, data collection and interpretation, water supply analysis, and evaluation of all proposed solutions raised by the State, the Federal Team, or by members of the public.

Cottingham Aff., at 2 (July 15, 2003).

10. The negotiating sessions were open to the public and public comment was received during meetings and open houses held in West Yellowstone, Gardiner, Bozeman, Kalispell, and Wisdom. Tweeten Aff., at 2; Technical Report, at 4.

11. In 1993, after more than a year of intensive technical work and more than a dozen negotiating sessions, the Settling Parties signed a Compact on issues defining and quantifying federal reserved water rights for Glacier National Park, Yellowstone National Park, and Big Hole National Battlefield ("Compact I"). Tweeten Aff., at 2. The negotiation teams decided that due to time constraints, they would settle the federal reserved water rights for the Little Bighorn Battlefield National Monument and the Bighorn Canyon National Recreation Area in a separate compact. Tweeten Aff., at 3-4.

12. Negotiation on the last two NPS units resumed following the 1993 session of the Montana Legislature. As in previous negotiations, meetings were open to the public, and informational open houses were held in Lodge Grass and Billings. Because both NPS units are located primarily within the Crow Reservation, the Commission and the Park Service met with the Crow Tribal Council to explain the Compact and to seek comments from the Tribe. The second Compact quantifying the federal reserved water rights for the Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area ("Compact II") was unanimously approved by the Commission in December of 1994. Tweeten Aff., at 2; Technical Report, at 4.

Ratification of the Compacts

13. Pursuant to §§ 85-2-702 and -703, MCA, Compact I for Yellowstone and Glacier National Parks and the Big Hole National Battlefield was ratified by the Montana Legislature and signed by the Governor of Montana on May 12, 1993. Section 85-20-401, MCA. Compact I became effective on January 31, 1994, upon approval of the Secretary of the Interior and the United States Attorney General. Section 85-20-401, MCA; Technical Report, at 4.

14. Pursuant to §§ 85-2-702 and -703, MCA, Compact II for the Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area was ratified by the Montana Legislature and signed by the Governor of Montana on March 15, 1995. Technical Report, at 4. Compact II became effective on May 30, 1995, upon approval of the Secretary of Interior and the Attorney General of the United States. Technical Report, at 4. Compacts I and II were consolidated by the Legislature, renamed the "United States Park Service–Montana Compact," and codified at § 85-20-401, MCA.

The United States Park Service–Montana Compact

15. The United States Park Service–Montana Compact was entered into for the purpose of "settl[ing] for all time any and all claims to water for certain lands administered by the National Park Service within the State of Montana at the time of the effective date of this Compact," which included the Big Hole National Battlefield, Glacier National Park, Little Bighorn Battlefield National Monument; Bighorn Canyon National Recreation Area, and Yellowstone National Park.[1] Compact, § 85-20-401, MCA.

16. Article III of the Compact sets forth the federal reserved water rights for that part of the five NPS Units situated in Montana.

To more easily address the issues involving the reserved water rights for the five NPS Units, the Settling Parties distinguished between consumptive and instream use, surface and groundwater, and separated the affected watersheds into five categories based on the types of streams existing in and

[1] In Article III(D) and (F), the Settling Parties agreed that the United States owns no federal reserved water rights for the Grant Kohrs Ranch National Historic Site or the Nez Perce National Historical Park, and that any water rights with respect to those units will be acquired pursuant to state law.

around the NPS Units.[2] Compact art. I(5) to (10), (23) & (26), and art. III, § 85-20-401, MCA; Technical Report, at 16, 18-19, 27-28.

17. Quantification Methodology. Because National Parks were established to "conserve the scenery and the natural and historic objects and the wildlife therein," the primary claim to federal reserved water for the five NPS units is for instream flow. Technical Report, at 9. Article II explains both the method of quantification of the reserved instream flow after rights of the United States for Category 3 and 4 streams, and the method of calculating the quantity of consumptive use pursuant to state law within a basin to which the United States has agreed to subordinate its reserved instream flow water right. Compact art. II(B), § 85-20-401, MCA.

Generally, with the exception of the reserved instream flow rights for the Little Bighorn Battlefield National Monument, quantification of the United States' reserved instream flow right includes the *entire flow* of that stream within the State of Montana at the point where the stream flows over or forms the boundary of the specified reserved land *after*: (1) all consumptive use water rights of any federal agency recognized under federal or state law are satisfied; and (2) subordination of the reserved instream flow right to water rights recognized under state law as set forth in and limited by Article III. Compact art. II(B)(1) & (C), § 85-20-401, MCA; *Motion for Incorporation of National Park Service–Montana Compact Into Preliminary and Final Decrees and for a Consolidated Hearing on any Objections to Such Compact*, Abstracts, at Exhibit B (filed August 7, 1996).

Most of the streams in the Compact are not gaged. Therefore, to estimate the average monthly flows, the Settling Parties used a variety of equations developed by the USGS selected on the basis of the individual morphological channel characteristics of the streams, the value to be protected, and the data available for that stream. Technical Report, at 9-10. "The methods used to determine the instream flows that were eventually negotiated provide a high level of resource protection, especially when compared to other preliminary methods, such as the Tennant Method, or the Arkansas Method," which are "less refined and therefore less specific to individual streams." Technical Report, at 10.

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[2] Category 1 streams headwater within the NPS Unit and flow directly out of the Unit, with the reserved water right ending where the stream exits the Unit. Category 1a streams headwater within the NPS Unit and drain, in part, non-federal land within the Unit, with the reserved water right ending where the stream exits the Unit. Category 2 streams headwater in sources on federal lands outside the NPS Unit and flow into the Unit, with the reserved water right beginning where the stream enters the Unit and ending where the stream exits the Unit. Category 3 streams headwater in Montana outside the NPS Unit and flow into the Unit, with the reserved water right beginning where the stream enters the Unit and ending where the stream exits the Unit. Category 4 streams are special case streams treated individually due to special circumstances. Compact art. I(5) to (9), and art. III, § 85-20-401, MCA; Technical Report, at 16, 18-19, 27-28.

Generally, the calculation of total consumptive use on a Category 3 or 4 stream includes all current and future consumptive use, recognized under state law, of surface water tributary to the stream to the point it enters the reserved land. The limits on total consumptive use on a Category 4 stream that forms the boundary of the reserved land include all current and future consumptive uses recognized under state law, of surface water tributary to the stream to the most downstream point that the stream forms the boundary of the reserved land. Compact article II(B)(2)(a), § 85-20-401, MCA. For purposes of calculating the existing level of consumptive use, non-consumptive uses are not included, and water rights as finally decreed will be used. *Id.*, § 85-20-401, MCA; Technical Report, at 6.

The calculation of consumptive use for each basin also includes all permits and certificates to develop groundwater developed *after* January 1, 1993, that is hydrologically connected to surface water tributary to the reserved portion of the stream. Because even small wells can have a cumulative effect on surface water flow, small wells that would normally be exempt from the permit process are also included. To expedite the processing of those applications, however, a simplified "registration" process has been agreed upon in which only the United States may object, and only after the United States has proven that the well is hydrologically connected to the surface water. If the United States proves the connection, but the limit on consumptive use for that source has not been reached, the appropriation is merely accounted for as part of the total amount of water available for development. If the limit has been reached, a permit will not be issued. For wells larger than the 35 gpm limit, the initial burden is on the applicant to prove that the well is not hydrologically connected to the surface water. Groundwater developed *before* January 1, 1993, is not included in the consumptive use calculation. Compact art. II(B)(2)(b), § 85-20-401, MCA; Technical Report, at 5-6.

18. Yellowstone Controlled Groundwater Area. The Settling Parties agreed that in creating Yellowstone National Park, Congress reserved the amount of water necessary to preserve the hydrothermal features of the Park, but that because the source of the hydrothermal features and the hydrothermal flow paths are still so poorly understood, the right is currently impossible to quantify. Compact art. IV(A), § 85-20-401, MCA; Technical Report, at 30-33. Instead of attempting to quantify the right, therefore, the Settling Parties agreed to place restrictions on the development of groundwater adjacent to Yellowstone National Park by establishing a Yellowstone Controlled Groundwater Area, modeled after the general controlled groundwater provisions of Title 85, Chapter 2, Part 3 of the Montana Code Annotated, but tailored to the unique circumstances of Yellowstone National Park. Compact art. IV(A), § 85-20-401, MCA; Technical Report, at 30-33.

To provide a rational and scientific basis for the initial boundaries and restrictions, the NPS established a Technical Oversite Committee of six geothermal experts from universities and professional firms within the State of Montana. Technical Report, at 33; *see also* Working Group, *Recommended Boundary for Controlled Groundwater Area in Montana Near Yellowstone Park* (April 15, 1993). Generally, the Settling Parties agreed that unless the Technical Oversight Committee determines that a specific appropriation can be made without adverse effect on the hydrothermal system within the Park, no permits will be approved to develop hydrothermal water (groundwater with a temperature of sixty degrees Fahrenheit or greater) connected to the system. Technical Report, at 36. While, initially, there is no restriction on the use of groundwater with temperatures of less than sixty decrees, restrictions on such cold water wells may be imposed in the future if the United States proves that development of the well could injure the hydrothermal system within the Park. Compact art. IV(C) & (G), § 85-20-401, MCA; Technical Report, at 36.

From the perspective of the United States, the Yellowstone Controlled Groundwater Area regulatory scheme: (1) authorizes an inventory of all existing wells in the area to identify wells with anomalous temperatures; (2) maintains the right of the United States to seek an injunction against pre-1993 state-based rights if necessary to protect the hydrothermal system within the Park; (3) maintains the right of the United States to object to new groundwater permits issued in the area; (4) requires the State of Montana to report all groundwater permits issued in the area to the NPS; and (5) gives the United States at least two members on the Technical Oversight Committee. Compact art. IV(C) & (J), § 85-20-401, MCA; Technical Report, at 33-36.

From the perspective of the State of Montana, the regulatory scheme: (1) is consistent with existing state law and state oversight of water use on private land; (2) provides for the possibility of thermal water development if methods are developed and/or proof provided that the development can be done without adverse impact on the Park; (3) provides a process for evaluation and modification of the boundaries and restrictions as new scientific information becomes available; (4) allocates decision-making with respect to the validity of restrictions and the impact of development on a case-by-case basis to a scientific, rather than a political, committee; (5) provides for judicial review of the committee's decisions; (6) provides for public notice of implementation and/or modification of the Area; and (7) provides for federal funding for state administration and study. Compact art. IV(J), § 85-20-401, MCA; Technical Report, at 32.

19. Article V provides, among other things, that nothing in the Compact "may limit the exclusive authority of the state . . . to administer all current and future water rights recognized under state law within and upstream of the reserved land covered by this Compact, *provided that* in administration of those water rights in which the United States has an interest, such authority is limited to that granted under federal law;" or ". . . determine the relative rights, *inter sese*, of persons using water under the authority of state law." Compact art. V(B) & (C)(5), § 85-20-401, MCA.

20. Article V also provides that the Compact may not be construed or interpreted "as a waiver by the United States of its right under state law to raise objections in state court to individual water rights claimed pursuant to the [Montana] Water Use Act . . . in the basins affected by this Compact;" or "as a waiver by the United States of its right to seek relief from a conflicting water use not entitled to protection under the terms of this Compact;" or "to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the effective date of this Compact." Compact art. V(C)(2), (3), & (7), § 85-20-401, MCA.

21. Article VI provides, among other things, that: (1) the water rights described in the Compact are the "full and final settlement" of the water right claims for the reserved land administered by the National Park Service in Montana on the effective date of this Compact; (2) the parties shall submit the Compact to an appropriate state court for approval and incorporation of the reserved water rights into a decree or decrees, in accordance with state law; (3) upon the court's approval and decree of the water rights described in the Compact, the court shall dismiss with prejudice all of the water right claims specified in Appendix 4 to the Compact; and (4) within ninety days of the issuance of a final decree or decrees by the court approving the Compact, and the completion of any direct appeals therefrom, or the expiration of the time for filing such appeals, the Settling Parties shall execute and file joint motions to dismiss with prejudice those claims made by the United States for Glacier National Park in *United States v. Aageson* (D. Mont. 1979), No. CV-79-21-GF; *United States v. Abell* (D. Mont. 1979), No. CV-79-33-M; *United States v. AMS Ranch, Inc.* (D. Mont. 1979), No. CV-79-22-GF, and any other claims made by the United States in federal court for the Little Bighorn Battlefield National Monument or the Bighorn Canyon National Recreation Area. Compact art. VI, § 85-20-401, MCA; Technical

Report, at 36-37.[3]

Preliminary Decree for the National Park Service Compact Subbasin

22. On July 28, 1994, the Settling Parties filed with the Water Court a *Motion for Incorporation of National Park Service-Montana Compact* [for Big Hole National Battlefield, Glacier National Park, and Yellowstone National Park] *into Preliminary and Final Decrees and for a Consolidated Hearing on any Objections to Such Compact*, pursuant to §§ 85-2-702(3) and 231(2), MCA. Following a general discussion on October 27, 1994, the Settling Parties advised the Court that no specific action in the case would be necessary until some time after the 1995 Legislature adjourned. Court Minutes, Case No. WC-94-1 (November 4, 1994).

23. On August 7, 1996, after ratification and approval of Compact II by the Legislature, the United States and the State of Montana jointly filed a *Motion for Incorporation of National Park Service-Montana Compact* [for Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area] *into Preliminary and Final Decrees and for a Consolidated Hearing on any Objections to Such Compact*.

24. On December 10, 1996, the Court issued *Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the National Park Service-Montana Compact.*

Public Notice and the Objection Process

25. On December 5, 1996, the Court instructed the Montana Department of Natural Resources and Conservation ("DNRC") to serve a *Notice of Entry of the National Park Service-Montana Compact Preliminary Decree and Notice of Availability* and summary descriptions of the NPS reserved water rights, in compliance with the requirements of § 85-2-232, MCA. The DNRC mailed the notices and summaries to approximately 35,000 water users and claimants of record in the basins that might be affected by the Compact. In addition, copies of the proposed Compacts were made available to the communities of Livingston, Gardiner, Bozeman, Kalispell, West Glacier, Columbia Falls, and the Big Hole. Order, Case No. WC-94-1 (December 5, 1996); Tweeten Aff., at 3.

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[3] Specifically excepted from this final settlement of water rights are water right claims 43P-W-162354-00 (irrigation) and 43P-W-162348-00 (recreation and wildlife) filed by the United States in the general adjudication as state-based claims. Compact art. VI(C), § 85-20-401, MCA.

26. In addition, the Water Court mailed a copy of each of the same to all federal land management agencies within the affected basins; all neighboring states adjoining the affected basins; all Indian Tribes with claims or rights to water in the affected basins; the County Clerks of Court of Beaverhead, Big Horn, Flathead, Glacier, Pondera, Madison, and Park Counties; and any other person requesting service of notice from the Water Court. A modified *Notice of Entry of National Park Service-Montana Compact Preliminary Decree and Notice of Availability* was also published in the affected basins (Upper and Lower Missouri River Divisions, Yellowstone River Division, Clark Fork River Division), in accord with the requirements of § 85-2-232(3), MCA. Order, Case No. WC-94-1 (December 5, 1996); Tweeten Aff., at 3.

27. In the *Notice of Entry*, the Court ordered that all objections to the Compact were to be filed by June 9, 1997, and all objections were to include "[a] statement of the specific grounds and evidence on which the objection is based." *Notice of Entry of National Park Service–Montana Compact Preliminary Decree and Notice of Availability*, Case No. WC-94-1 (December 10, 1996).

28. Timely objections to the Compact were filed by James C. Anderson, Frank C. Carrico, Robert N. Gilbert, John D. Graham, Robert E. Johnston and Delorale A. Johnston, Melvin E. Kastella, Larry A. Landell and Nancy M. Landell, Joseph W. Landon and Sibyl H. Landon, Helen M. Mahnke, Kenneth R. McDonald, Kay A. McKay, Karl E. Mickus, Virginia M. Moore, James R. Mountain, Richard D. Mountain, Martin E. Portman, Jeff Shryer, Victor E. Taber, Steve F. Thale, Bruce Tutvedt, Liane M. Vadheim, Eugene E. Vincelette, and Peter H. Widman.

29. On August 18, 1997, pursuant to Rules 26 and 36, M.R.Civ.P., the United States served joint discovery requests on all of the objectors.

30. After two extensions of time for response, only Robert Gilbert filed responses to the United States' discovery requests.

31. James C. Anderson, Frank C. Carrico, Larry A. Landell and Nancy M. Landell, Joseph W. and Sibyl H. Landon, Helen M. Mahnke, Kay A. McKay, Virginia M. Moore, Jeff Shryer, and Eugene E. Vincelette subsequently withdrew their objections.

32. On January 15, 1998, the United States filed a *Motion for Partial Summary Judgment and Supporting Brief* to dismiss the objections of the remaining non-responding objectors because the request for admissions were deemed as admitted pursuant to Rule 36(b), M.R.Civ.P. The State of Montana joined this motion on January 22, 1998.

33. On December 10, 1998, the Water Court granted the United States' motion to dismiss the objections of the fourteen non-responding objectors. Order Granting Motion for Partial Summary Judgment, Case No. WC-94-1 (December 10, 1998).

34. The objection of the single remaining objector, Robert Gilbert, was settled and withdrawn by *Stipulation*, filed with the Court on November 8, 2000, conditional upon the Court entering a decree consistent with the Compact. Stipulation Between Robert Gilbert, the State of Montana, and the United States, Case No. WC-94-1 (Nov. 8, 2000) (hereinafter referred to as "Stipulation").

Objector Robert Gilbert is the owner of land in the vicinity of Silver Gate, Montana, near Soda Butte Creek, and upstream of Yellowstone National Park. In the future, Gilbert may seek to subdivide this property, or build additional dwelling units on the property, and he was concerned that under Art. II (B) (2)(b) and (3)(b) of the Compact, he could be foreclosed from developing additional wells for use on the subdivisions or units. Stipulation, at 2. In the *Stipulation*, the Settling Parties agreed, among other things, that:

> [T]he water right appurtenant to the existing well located on Lot 1 of the Gilbert property: (a) is valid and enforceable; (b) has a *de minimus* impact on water that is tributary to Soda Butte Creek; and (c) does not cause the total limits on consumptive use rights set forth in Table 11 of the Compact to be reached or exceeded.

Stipulation ¶ 4. In addition, the National Park Service agreed that:

> [B]ased upon its understanding of the hydrologic system, and its analysis of similar wells, development of up to two additional wells on the Gilbert property is consistent with the Compact, and causes no injury to the Reserved Water Rights of the National Park Service in Soda Butte Creek, provided that the wells are constructed and operated within the following limitations: (a) no more than two wells, in addition to the existing well, will be developed on the Gilbert property; (b) flow rate of 12 g.p.m. or less per well; (c) limitation of diversion to 1.0 acre feet or less per well; (d) each well is completed below the "Blue Clay" layer located approximately 120 feet below ground surface. . . . ; (e) each well is limited to serving only one single-family dwelling unit.

Stipulation ¶ 5.

The United States further agreed that it would not object to the issuance of any required permits for the wells that are consistent with those limitations, and that so long as such wells and well permits are otherwise consistent with those limitations, the United States will not object to the development of a well which, due to natural conditions, has a flow rate greater than 12 gpm. Stipulation ¶ 6. The State of Montana, in turn, agreed that the well or wells would be exempt from the normal permit requirements

of § 85-2-306, MCA, and "may be developed and used so long as the water developed does not trigger the temperature limits set forth in the Compact." Stipulation ¶ 7.

35. There are currently no unresolved outstanding objections to the Compact, or any allegations of fraud, overreaching, or collusion between the Settling Parties.

Judicial Review and Approval

36. On July 21, 2003, pursuant to §§ 85-2-234 and -702(3), MCA, the McCarran Amendment, 43 U.S.C. § 666 (2000), and Article VI(B) of the Compact, the Settling Parties filed a *Motion for Approval of the National Park Service-Montana Compact and Entry of Decree*.

37. On December 29, 2004, pursuant to an earlier Order of the Court, Appendix 4 to the Compact was filed. A copy of Appendix 4, entitled *NPS - Montana Appendix 4 Existing Claims to be Dismissed*, is attached hereto. Appendix 4 includes 198 statements of claim, reserved rights, provisional permits, and groundwater certificates that are to be dismissed upon approval of the Compact. Each existing water right claim in Appendix 4 shall be dismissed and shall bear the following remark:

> THIS CLAIM WAS DISMISSED PURSUANT TO ARTICLE VI(B)(1) OF THE UNITED STATES NATIONAL PARK SERVICE - MONTANA COMPACT.

CONCLUSIONS OF LAW

I

JURISDICTION

The Montana Water Court has concurrent jurisdiction to review the United States Park Service--Montana Compact and decree the federal reserved water rights defined therein under the authority granted by the McCarran Amendment, 43 U.S.C. § 666 (2000); §§ 85-2-231, -233, -234, and 85-2-701 to -703, MCA; and the United States Park Service–Montana Compact, art. VI (A) & (B), § 85-20-401, MCA. *See Arizona v. San Carlos Apache Tribe* (1983), 463 U.S. 545, 564; *Colo. River Water Conservation Dist. v. United States* (1976), 424 U.S. 800, 808-09. In *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, the Montana Supreme Court held that the Montana Water Use Act, as amended by Senate Bill 76, is adequate on its face to allow the Water Court to adjudicate federal reserved water rights. 219 Mont. 76, 97-99, 712 P.2d 754, 767-79 (1985) ("*Greely II*").

II

STANDARD OF REVIEW

A compact concluded and incorporated into a final decree pursuant to § 85-2-231, MCA, is similar to a consent decree, in that the decree is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise, subject to continued judicial policing. *See, e.g., United States v. Oregon* (9th Cir. 1990), 913 F.2d 576, 580, *cert. denied sub nom., Makah Indian Tribe v. United States* (1991), 501 U.S. 1250 (citing *Williams v. Vukovich* (6th Cir. 1983), 720 F.2d 909, 920).[4]

Accordingly, this Court reviews compacts incorporated into preliminary and final decrees in this general adjudication under a standard of limited review similar to that applied by the Ninth Circuit Court of Appeals to review consent decrees. Simply stated, that standard provides that:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice v. Civil Serv. Comm'n (9th Cir. 1982), 688 F.2d 615, 625, *cert. denied*, *Byrd v. Civil Service Commission* (1983), 459 U.S. 1217 (emphasis added). Primarily, the Court must be satisfied that the compact is "fundamentally fair, adequate and reasonable" to the public interests involved, and to those third parties not present during the negotiation whose private interests are affected. *United States v. Oregon*, 913 F.2d at 580-81. In addition, because a finally decreed compact is a form of judgment, it must conform to all applicable law, though it need not impose all of the obligations authorized by law. *Id.* at 581.

Though the review is intended to be limited, the review requires more than automatic incorporation of the proposed compact into the final decree. As explained by the Ninth Circuit in *Officers for Justice:*

> The . . . court's ultimate determination will necessarily involve a balancing of several factors . . . . The relative degree of importance to be attached to any particular factor will

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[4] *See, e.g.,* Memorandum Opinion, Case No. WC-2000-01 (June 12, 2002) (Chippewa Cree Tribe-Montana Compact); Memorandum Opinion, Case No. WC-92-1 (August 8, 2001) (Fort Peck-Montana Compact); Memorandum Opinion, Case No. WC-93-1 (August 3, 1995) (Northern Cheyenne–Montana Compact).

> depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

688 F.2d at 625.

The Montana Legislature has clearly expressed its intent that the State of Montana attempt to conclude compacts for the equitable division and apportionment of waters between the State and its people and the federal government claiming reserved waters within the State. Sections 85-2-701 & -703, MCA. In deference to that policy, the Water Court deems compacts concluded pursuant to §§ 85-2-701 through -703, MCA, presumptively "fair, reasonable and adequate," if the compact is the result of good faith, arms-length negotiations, without fraud, collusion or overreaching by the parties. *See, e.g.*, § 85-2-702, MCA; *United States v. Oregon*, 913 F.2d at 581 (citing *Vukovich*, 720 F.2d at 921).

In light of that deference, the Water Court places the burden of proving a compact invalid upon objectors to the compact.

III

COMPACT IS CONSISTENT WITH APPLICABLE LAW

Federal Procedural Law

The submission of this Compact for the review and decree of the Montana Water Court is consistent with federal procedural law.

In 1952, Congress altered federal law by granting state courts concurrent jurisdiction to adjudicate federal water rights under certain circumstances. The McCarran Amendment provides that "[c]onsent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, *or otherwise*, and the United States is a necessary party to such suit." 43 U.S.C. § 666 (2000) (emphasis added).

By enacting the McCarran Amendment, Congress effectively waived the sovereign immunity of the United States to involuntary joinder as a party in state court general water rights adjudications. *Arizona v. San Carlos Apache Tribe* (1983), 463 U.S. 545, 564; *Colo. River Water Conservation Dist. v. United States* (1976), 424 U.S. 800, 808-09; *United States v. District Court of County of Eagle* (1971), 401 U.S. 520, 525; *Greely II* (1985), 219 Mont. 76, 84, 712 P.2d 754, 759. The McCarran Amendment

did not, however, affect or change the substantive or procedural law on which federal water rights are based and by which the claims must be determined. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 570-71; *Colorado River*, 424 U.S. at 813; *United States v. City and County of Denver* (Colo. 1982), 656 P.2d 1, 9; *Greely II*, 219 Mont. at 99, 712 P.2d at 768. All of the federal and state courts addressing the issue have concluded that while claims based on unconflicting state law must be decided by state law, federal claims based on federal law must be determined by federal law. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 570-71; *California v. United States* (1978), 438 U.S. 645, 678; *Cappaert v. United States* (1976), 426 U.S. 128, 145-146 (1976); *City and County of Denver*, 656 P.2d at 9-10; *Greely II*, 219 Mont. at 96-100, 712 P.2d at 766-69.

Federal Substantive Law

The federal reserved water rights recognized, defined, and quantified in the Compact and proposed decree are consistent with federal substantive law.

In a series of cases beginning in 1897, the United States Supreme Court examined the often conflicting jurisdiction between the state and federal government with respect to the waters on or adjacent to federal lands and concluded that whatever power the states had acquired over the waters within their borders as a result of the Acts of 1866, 1870 and 1877, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on "appurtenant" lands withdrawn from the public domain and reserved for specific federal purposes. *United States v. New Mexico*(1978), 438 U.S. 696, 699-700; *California*, 438 U.S. at 662-63; *Cappaert*, 426 U.S. at 138, 143-46; *Arizona v. California* (1963), 373 U.S. 546, 597-98; *Fed. Power Comm'n v. Oregon* (1955), 349 U.S. 435, 447-48; *United States v. Winters* (1908), 207 U.S. 564, 577; *United States v. Rio Grande Dam and Irrig. Co.* (1899), 174 U.S. 690, 703.

In *Cappaert v. United States*, the United States Supreme Court described the doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. . . . In determining whether there is a federally reserved water right implicit in a federal

> reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. at 138-39 (citations omitted).

All five NPS units, whether called national parks, national monuments, national recreation areas, or otherwise, were withdrawn and reserved by the federal government for specific federal purposes, and are also subject to the broad mandates of the National Park System's Organic Act of 1916, to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." National Park System's Organic Act of 1916, ch. 408, § 1, 39 Stat. 535 (codified at 16 U.S.C. § 1). *See* authorities cited in *supra* Finding of Fact 5.

Although, some of the units were established pursuant to the Antiquities Preservation Act of 1906, which authorized the President to create historic landmarks, historic and prehistoric structures, and other objects of historical or scientific interest "that are situated upon the lands owned or controlled by the Government of the United States," the management and administration of those units were assigned to the NPS by the NPS Organic Act of 1916. Antiquities Preservation Act of 1906, 16 U.S.C. § 431; *see also* authorities cited in *supra* Finding of Fact 5.

Because the federal reserved water right doctrine is built on implication and is an exception to Congress' explicit deference to state water law in most other areas, federal courts have consistently construed the doctrine narrowly as a "minimal need" standard and applied it with sensitivity to its impact upon those who have obtained water rights under state law. *See, e.g., Cappaert*, 426 U.S. at 138-41; *Greely II*, 219 Mont. at 93, 97, 712 P.2d at 767. In *Cappaert*, for example, the United State Supreme Court held that "[t]he . . . doctrine . . . reserves only that amount of water necessary to fulfill the purposes of the reservation, no more." *Cappaert*, 426 U.S. at 141 (citing *Arizona v. California* (1963), 373 U.S. 546, 600-01). In *United States v. New Mexico*, the United States Supreme Court explained that:

> While many of the contours of . . . [the doctrine] remain unspecified, the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'... Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for

> a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 700-02 (citations omitted).[5]

Quantifying the scope and extent of this open-ended standard has proved difficult at best, and after nearly one hundred years of legislation, litigation, and policy-making, there are still few bright lines clearly or consistently defining the doctrine. *Greely II*, 219 Mont. at 92, 712 P.2d at 764. Quantifying the federal reserved water rights for these five NPS units through litigation, therefore, would likely have been time-consuming, costly, and divisive, with many private, state-based water rights unfairly displaced in favor of unnoticed and heretofore unrecognized federal reserved water rights.

State Procedural Law

Though the United States could have litigated its federal reserved water rights in the Montana Water Court under the federal reserved water right doctrine articulated by the United States Supreme Court, it chose instead to negotiate its rights through Montana's more flexible, less costly, compacting procedure. In negotiating the federal reserved water rights under this procedure, the Settling Parties complied with all Montana procedural law.

In 1973, the Montana legislature passed the Water Use Act to administer, control, and regulate all water rights within the State of Montana and to establish a system of centralized records of all such rights. Section 85-2-101(1) & (2), MCA. In 1979, the Water Use Act was amended to "expedite and facilitate the adjudication of all existing rights to the use of water in the State of Montana," and to provide a procedure whereby the State could comprehensively adjudicate and administer all water right claims within the State of Montana, including federal and Indian reserved water rights, as authorized by the McCarran Amendment. Title 85, Chapter 2, Montana Code Annotated.

As part of the 1979 amendments, the Legislature expressed its intent that "the state of Montana proceed under the provisions of [Part 7] in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people" and the federal government claiming reserved

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[5] For the Montana Supreme Court's interpretation of the federal reserved water right doctrine, see generally *In re Beneficial Water Use Permit* (1996), 278 Mont. 50, 923 P.2d 1073; *State ex rel. Greely v. Confederated Salish & Kootenai* (1985), 219 Mont. 76, 712 P.2d 754; *State ex rel. Greely v. Water Court* (1984), 214 Mont. 143, 691 P.2d 833 ("*Greely I*").

water rights within the state, and it established a Reserved Water Rights Compact Commission to act on behalf of the governor and the people of Montana as a whole in concluding such compacts. Section 85-2-701, MCA; *see also* §§ 85-2-702 & -703, and 2-15-212, MCA.

The power of the federal government to enter into permanent agreements with the states, ceding to them federal works and powers, has been recognized since the United States Supreme Court decision in *Searight v. Stokes* (1845), 44 U.S. 151, 166-67. The power of the State to bind its citizens through equitable division by compacts with other sovereigns has been recognized since the United States Supreme Court decision in *Poole v. Lessee of Fleeger* (1837), 36 U.S. 185, 209. *See also Hinderlider v. LaPlata River & Cherry Creek Ditch Co.* (1938), 304 U.S. 92, 105-06.

Negotiations between the United States and the Commission were commenced by the Commission, as required in §§ 85-2-702 and -703, MCA. While negotiations were being conducted, all proceedings to adjudicate federal reserved water rights for the National Park Service units within Montana were suspended, in accordance with Section 85-2-217, MCA. The concluded Compacts were signed by the Commission, ratified by the Montana Legislature, signed by the Governor, and approved by the United States Secretary of Interior and the United States Attorney General, in accordance with § 85-2-702, MCA. Upon ratification, the terms of the combined Compact were included in a special National Park Service Compact Subbasin Preliminary Decree for review, which was made available to other water users for review and objection, in accordance with §§ 85-2-231(2) and -702(3), MCA. Timely filed objections to the Compact were considered by the Court and ultimately dismissed, withdrawn, or resolved by the parties. *See supra* Findings of Fact 4, 6-36.

Accordingly, the Compact was authorized, negotiated, concluded, decreed, and reviewed consistent with all applicable federal and Montana law.

IV

COMPACT IS PRODUCT OF GOOD-FAITH NEGOTIATION

The Compact and record in this case also establish that the Compact is the result of good-faith, arms-length negotiation, and is not the product of fraud or overreaching by, or collusion between, the negotiating parties.

The Settling Parties each represented distinct and competing public interests and policies with respect to the waters being adjudicated. The United States sought a decree recognizing and protecting

its right to reserve at least a portion of the waters in the affected basins from appropriation by state water users. The State of Montana sought to mitigate the impact of those federal reserved water rights on existing state water right claimants through a final quantification of the federal reserved water rights and sufficient notice to state water users of the potential impact that senior federal reserved water rights could have on junior state-based water rights. Technical Report, at 2-3. As pointed out in by the Commission in its Technical Report:

> [T]he greatest source of conflict between appropriative and reserved water rights is created by new exercise of a reserved water right with a priority date that relates back to the date of the reservation. Fueling this conflict is the fact that the United States did not begin to actively assert reserved water rights until the 1960's, thus substantial development of junior water rights has occurred in some basins without consideration of water availability in light of the magnitude of reserved water rights.
>
> Conflicts created by the legal differences between reserved and appropriative rights are further aggravated by the complexities of land ownership. Montana is a headwater state for the Columbia, Missouri, and Hudson rivers. The State contains 28% federal or Tribal land, 69% of which is reserved.
>
> Currently, of the 85 subbasins in the State, 70 contain claims for reserved water rights. Adjudication of water rights in these basins is complicated by factors that include: checkerboard Tribal and non-Tribal ownership of fee land within Indian reservations; private water diversions within national forests; preexisting dams within wilderness areas; rivers that form the boundaries to national parks and Indian reservations and . . . to private land; and streams that begin in areas of private land before flowing onto a reservation with reserved instream flow rights.

Technical Report, at 2-3 (citations omitted).

During the negotiation, both of the parties were represented by governmental agencies established to protect their respective public interests. Those agencies in turn were supported and advised by competent legal and technical experts in the field of water resource analysis and law, including experienced legal counsel, historical researchers, resource managers and superintendents from the NPS units in Montana, hydrologists, fish and wildlife biologists, and experts in the fields of riparian vegetation, geothermal sciences, geomorphology, and GIS and mapping. *See supra* Findings of Fact 6-9.

The information collected was interpreted, analyzed, and shared between the parties, and the methodologies and solutions proposed were vigorously debated. Although the agreement was technically only between the Settling Parties, there was extensive public involvement throughout the process, with numerous public informational meetings and private meetings with individual water users. *Id.*

Chris Tweeten, Commission Chairman, affirmed in his affidavit that :

> The Commission evaluated the litigation risk of success of the NPS with their reserved claims in the statewide adjudication, and concluded that significant numbers of water right holders under state law could be adversely affected or displaced. The Compact represents a compromise of potential outcomes allowing a measure of development and protection for state-based water right holders.

Tweeten Aff., at 3.

Similarly, Charles Pettee, Chief of the regional NPS Water Rights Branch, affirmed that:

> The NPS evaluated the risks inherent in pursuing claims for reserved water rights through contested case litigation, and concluded that in light of the risks and the benefits of the Compact terms, the Compact is a prudent and reasonable alternative to litigation.
>
> The Compact is a fair and reasonable approach for the protection of NPS rights and resources. Since the time of its ratification by the Montana legislature and the United States, the Compact has been implemented in an orderly, well-coordinated fashion by the Montana Department of Natural Resource Conservation and the National Park Service. NPS resources are being protected while legitimate water development, within the agreed upon limitations of the Compact, continues to the mutual benefit of the NPS units and the citizens of Montana.

Pettee Aff., at 3-4.

In conducting its review, the Court is not required to reach ultimate conclusions with respect to the contested issues of fact and law involved in the negotiation, for it is the very uncertainty of outcome in litigation, and the avoidance of wasteful and expensive litigation, that induces and motivates a consensual settlement such as this Compact. *See, e.g., Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982), 688 F.2d 615, 624-25, *cert. denied, Byrd v. Civil Service Commission* (1983), 459 U.S. 1217. The certainties and uncertainties inherent in a litigation of the issues were employed by the parties as tools to gain leverage and bargaining power, and in exchange for saving the cost and inevitable risk of litigation, each party gave up some point it might have won in a court of law. In that process, the parties resolved to their own satisfaction the factual and legal issues involved in quantifying these federal reserved water rights.

In the absence of clear state or federal law prohibiting either the Compact or its provisions, and having found no evidence of fraud, coercion, or overreaching by the negotiating parties, the Court's role is reduced to determining whether the Compact is "fair, adequate, and reasonable to all affected by it."

V

COMPACT PRESUMED FAIR, REASONABLE, AND ADEQUATE

In deference to Montana's policy of encouraging the negotiation and settlement of federal reserved water rights through the statutory compacting process, and in the absence of any evidence of fraud, coercion, or overreaching by the parties, the Montana Water Court *presumes* that compacts concluded through that process are "fundamentally fair, adequate, and reasonable." *See, e.g.*, § 85-2-702, MCA; *United States v. Oregon* (9th Cir. 1990), 913 F.2d 576, 581, *cert. denied sub nom.*, *Makah Indian Tribe v. United States* (1991), 501 U.S. 1250 (citing *Williams v. Vukovich* (6th Cir. 1983), 720 F.2d 909, 921).

That presumption has particular force where, as here, the parties were represented in the negotiation by governmental agencies established to protect the public interests at stake, staffed and advised by legal and technical experts in the field of water resource analysis and law, and where the concluded compact has already been ratified by the Montana Legislature, signed by the Governor, and approved by the appropriate federal agencies. *See supra* Findings of Fact 13-14. *See also, e.g.*, *Davis v. San Francisco* (9th Cir. 1989), 890 F.2d 1438, 1445; *SEC v. Randolph* (9th Cir. 1984), 736 F.2d 525, 528-29; *Officers for Justice*, 688 F.2d at 624-25. As so aptly stated by the First Circuit Court of Appeals:

> That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. . . . Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance.

United States v. Cannons Engineering Corp. (1st Cir. 1990), 899 F.2d 79, 84.

Respect for the agencies' roles is even further heightened where, as here, there is no exclusive or universally correct method for quantifying federal reserved water rights under either federal or Montana law. As stated above, the rules articulated by the United States Supreme Court for quantifying federal reserved water rights are vague and open-ended and provide few bright lines to guide the Court. Montana's "fair and equitable division and apportionment" standard for compacts is even less clearly

defined.[6] Without a clearly articulated method for quantifying federal reserved water rights, the task of choosing and applying the appropriate methodology is best left to the governmental agencies legislatively tasked and expertly staffed to analyze, negotiate, and administer the rights.

In the absence of fraud, coercion, or overreaching by the negotiating parties, and without a single, clearly mandated methodology for quantifying federal reserved water rights, the governmental agencies involved were free to choose the appropriate methods and craft creative solutions to the complex problem of quantification. In reviewing those methodologies and solutions, the Water Court should not judge them against some hypothetical or speculative measure of what might have been achieved through litigation, or by whether the settlement is one which the Court, itself, might have fashioned. Once concluded in accordance with law, the merits of such public policy decisions were for the Legislature and appropriate federal agencies to decide, unless there is demonstrated injury to qualified objectors.

VI

NO DEMONSTRATED INJURY TO QUALIFIED OBJECTORS

To test the validity and fairness of the Compact with respect to the rights of other affected water right claimants not present during the negotiation, the concluded Compact was incorporated into a preliminary decree, in accordance with Montana law, and notice of the preliminary decree was served on and made available for review to those parties identified in § 85-2-232, MCA. *See supra* Findings of Fact 22-27. Out of approximately 35,000 notices of availability and summaries served, only twenty-six water users filed objections to the Compact. Eleven of those objectors subsequently withdrew their objections. Fourteen of the remaining objectors were dismissed by summary judgment for their failure to respond to dispositive discovery requests for admission properly served by the United States. The objection of the single remaining objector, Robert Gilbert, was settled and withdrawn by Stipulation on November 8, 2000, conditional upon the Court entering a decree consistent with the Compact. *See supra* Findings of Fact 28-35.

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[6] Though not defined by Montana statute, the United States Supreme Court has described the "equitable apportionment" standard as a "flexible" standard, which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Colorado v. New Mexico* (1982), 459 U.S. 176, 183, 185. Among the factors normally considered in an "equitable apportionment" of water, for example, are the physical and climatic conditions, the consumptive use of stream segments, the return flows, the existence of established senior uses, the efficiency of current uses, the extent to which the respective States have conserved and augmented their water supplies, the future needs of the States, and the benefits and harms to the competing states of a particular apportionment. *Id.; see also Nebraska v. Wyoming* (1945), 325 U.S. 589, 618; *Wyoming v. Colorado* (1922), 259 U.S. 419, 484.

As there are no remaining, unsettled objections to the Compact as set forth in the Preliminary Decree for the National Park Service Compact Subdivision, the Court is satisfied that the Compact is fundamentally fair, adequate and reasonable to all concerned.

VII

APPROVAL AND CONFIRMATION

The Settling Parties's Motion for Approval of the United States National Park Service - Montana Compact is **GRANTED**. The Compact is **APPROVED** and **CONFIRMED.** Entry of Final Judgment and issuance of a Rule 54(b) Certification will occur at a later date.

DATED this day of , 2005.

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C. Bruce Loble
Chief Water Judge

CERTIFICATE OF MAILING

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